United Nations AT/DEC/1125

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1125

Case No. 1172: MWANGI Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President, Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 20 October 2000, Stanley Gichohi Mwangi, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 January 2001, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

"*II: PLEAS*

1. Reverse my decision for early retirement ...

2. Direct and advise the Secretary-General to reinstate me with full benefits...

3. Direct and advise the Secretary-General to compensate me for the entire period that I have been out of employment ...

4. ... that I be paid Special Post Allowance (SPA) aggregate between levels NO-B step 1 and NO-B step 10 as verbally negotiated and agreed between me and ... UNICEF Regional Personnel Officer.

5. ... that I be paid [SPA] at the salary rates prevailing during the period when the SPA was approved.

6. ... that I be paid special and general damages ... [of] ... $97,000.

7. Set aside the decision, conclusions and recommendations of the Nairobi Joint Appeals Board [(JAB)]...

8. ... that I be awarded compensation for the costs of this appeal.

9. ... that when reinstated and my security is threatened, I be relocated to another duty station.

10. ... any other relief or benefit that the Administrative Tribunal may find just and reasonable... "

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 August 2001 and periodically thereafter until 31 October 2002;

Whereas the Respondent filed his Answer on 31 October 2002;

Whereas the Applicant filed Written Observations on 2 December 2002;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF, Kenya Country Office (KCO), on a three-month temporary fixed-term appointment as Finance Assistant at the GS-7 level, on 1 October 1992. His appointment was extended several times and, on 1 September 1993, it was converted to a fixed-term appointment, which was extended periodically. Following a re-structuring exercise whereby the nine-grade structure was changed to a seven-grade structure, the Applicant's post was reclassified at the GS-5 level.

From 31 October 1994 until 31 December 1995, the Applicant was assigned to the audit team investigating KCO, in order to uncover misappropriation of funds. Subsequently, the local police took over the investigation and the Applicant was assigned to assist them, from April 1997 to March 1998. On several occasions during these periods, the Applicant reported being threatened and attacked.

On 25 May 1996, the Applicant wrote to the Representative, KCO, requesting to be transferred to another duty station. The Representative, KCO, corresponded extensively on this subject with the Division of Human Resources, UNICEF, expressing his own concern for the Applicant and requesting their prompt action, with a possibility of deploying the Applicant to "any other office in the Region".

On 10 December 1997, the Applicant was informed that effective 31 December 1997, his post would be abolished. He was further informed that the Administration would assist in identifying a suitable post for him within the Organization. On 11 March 1998, the Applicant was informed that he was selected to the post of Senior Accounts Clerk, KCO.

On 26 March 1998, the Applicant wrote to the Representative, KCO, requesting early retirement and consideration under Chapter 18 of the UNICEF Human Resources Policy and Procedure Manual, concerning Staff on Abolished Posts. The Applicant reminded of his role in the investigations of KCO and stated, inter alia, that as a consequence, he and his family had been subjected to threats, he had been attacked and his health had been adversely affected. That was his reason for requesting early retirement. He further requested to be compensated for performing work at a higher level while assisting the auditors, consideration for loss of earnings and allowance for the risks that working with the police entailed.

On 9 June 1998, the Applicant was offered a two-year fixed-term appointment as Senior Accounts Clerk at the GS-5 level and, on 23 June, he signed the letter of appointment.

On 25 June 1998, the Applicant wrote to the Representative, KCO, repeating his request for early retirement and for compensation of 18 months indemnity under Chapter 18 of the Human Resources Policy and Procedure Manual, as well as SPA for 18 months while working with the auditors and, additionally, SPA for 10 months while working with the Kenyan Police. He also requested unspecified compensation to cover his security expenses.

On 1 July 1998, the Applicant was appointed to the post of Senior Accounts Clerk.

On 15 September 1998, the Applicant was informed of the decision to pay him, on an exceptional basis, SPA for 24 months at the NO-B step 1 level, covering both his work with the auditors and with the police. On the same day, the Applicant wrote to the Representative, KCO, expressing his gratitude for supporting his request for payment of SPA and reiterating his previous request, to separate from service as of close of business on 31 October 1998. The following day, the Representative, KCO, informed the Applicant that he had accepted this request.

On 30 September 1998, the Applicant wrote to the Officer-in-Charge, Operations, and while thanking the various people involved, he nonetheless expressed dissatisfaction at the decision to pay him SPA at the NO-B step 1 instead of NO-B step 10 level and that the payment would be made based on the salary levels of 1994/1995 and 1996 rather than at the 1998 level.

On 15 October 1998, the Applicant was informed of the decision to pay him termination indemnity equivalent to 6 months net base salary, based on his years of service, in line with paragraph 18.2.28 of the Human Resources Policy and Procedure Manual.

On 27 October 1998, the Applicant lodged an appeal with the Nairobi JAB.

On 31 October 1998, the Applicant separated from service.

On 30 December 1998, KCO wrote to the JAB advising that the Applicant's appeal was premature as he had not requested administrative review. On 12 February 1999, the Applicant requested the Secretary-General to review the decision regarding the granting of SPA and other compensation. On 9 June 1999, the Deputy Executive Director, UNICEF, responded, rejecting the Applicant's requests for payment of SPA at NO-B Step 10 level and for further compensation.

The JAB adopted its report on 26 July 2000. Its considerations, conclusions and recommendations read, in part, as follows:

"*Considerations*

...

1. Regarding the request for further indemnity payment in the amount of 50 per cent salary for six months the panel rejects this plea on the grounds that ... the appellant does not fulfil the requirement set out in paragraphs 18.2.31 of the Human Resources Policy and Procedure Manual. ...

2. Concerning the appellant's request for payment of SPA aggregate between NO-B step 1-level and NO-B step 10-level, the panel finds no legal justification for this claim.

Although the appellant claims that there was an agreement between UNICEF and himself to be paid SPA at the NO-B step 10-level, he has not provided the panel with sufficient evidence that this was indeed the case.

...

3. The appellant's claim to be paid the aggregate between the current SPA salary levels and those of 1994/5/6 also had to be rejected .... The very nature of SPA payments as a compensation for tasks performed at a higher level than the one the staff member occupies, excludes the possibility of granting payments at levels prevalent at a later date.

4. There is also no legal basis for the appellant's claim to be paid 3 months salary in lieu of notice. This conclusion is self-evident when considering that it was the staff member himself who had resigned from his employment ...

5. The appellant's request for compensation for security expenditures as well as his claim for damages at an amount of US$87000 for endangerment of his life and health had also to be rejected by the panel for lack of a legal basis for these claims.

... the damages alleged by the staff member are the direct result of the Organization's justified endeavour to uncover criminal acts of misappropriation which occurred in its ranks. Such a conduct cannot be wrongful and cannot therefore conceivably result in a claim for damages.

Conclusions and Recommendations

.. the panel concludes that the entirety of the appellant's pleas cannot be sustained.

The panel therefore recommends that the present appeal be rejected.

Remarks

... "

On 5 October 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusion and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 29 January 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's request for early retirement was made while he was suffering both physically and mentally.

2. Were it not for the concern for the security of his family and himself and the stress related problems that ensued, the Applicant would not have requested early retirement.

3. The Applicant had an oral agreement with the Respondent that the SPA be paid to him at the NO-B step 10 level and at current rates.

4. The Applicant was the only local staff involved in the audit; as a result, while the auditors departed for New York, he remained in Kenya and suffered threats and hostility. The Applicant was promised that he would be relocated to another duty station but this did not materialize.

5. The Respondent has the obligation to protect and ensure that staff work in an environment which is free of danger.

Whereas the Respondent's principal contentions are:

1. The award of an SPA is discretionary.

2. The SPA was correctly calculated at NO-B, step 1 level, at 1994-1996 salary level.

3. The decision was not vitiated by bias, arbitrary behaviour or other extraneous factors.

4. The Applicant's claim to special and general damages of US$97,000 is without legal basis.

5. The Applicant's pleas relating to (i) reinstatement and (ii) compensation for the entire period that he was unemployed since his voluntary resignation from UNICEF are not receivable.

The Tribunal, having deliberated from 24 June to 25 July 2003, now pronounces the following Judgement:

I. The Tribunal is satisfied that the following pleas of the Applicant must be rejected, in accordance with the JAB's findings and conclusions:

1. The plea for an SPA aggregate between NO-B step 1 and NO-B step 10.

The Applicant did not sustain his burden of proving that a binding agreement existed, whereby he would be paid the SPA at the NO-B 10 level. His assertion that a verbal settlement to this effect existed between him and the Administration is not supported by the evidence.

2. The plea for the aggregate between current SPA salary levels and those of 1994 to 1996.

As correctly stated by the JAB, the very nature of SPA payments is to compensate the staff member for performing tasks at a level higher than the level of the post which he or she occupies. It follows, that such payments would be made while the staff member is performing these higher-level duties and therefore paid at a rate, which would have been paid while he was actually performing these tasks. Having said this, the Tribunal is of the opinion that the SPA should have been paid at the time the Applicant was indeed performing these higher level duties rather than a few years later. The Tribunal therefore holds that the payment of the SPA should bear interest from the date on which his entitlement to SPA began (three months after starting to perform duties at the higher level) until the actual date of payment.

The Tribunal wishes to emphasise that the granting of SPA, in and of itself, is discretionary. Staff rule 103.11, which governs the payment of SPA, provides, inter alia:

> "(b) [A] staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding three months *may, in exceptional cases,* be granted a non-pensionable [SPA]...." (emphasis added).

Personnel Directive PD/1/84/Rev.1 dated 28 September 1990 and Amend.1of 20 October 1992, also affirm that payment of an SPA is not a staff member's entitlement as a matter of right but an exercise of discretion by the Secretary-General. The Tribunal notes that the Applicant was paid SPA, on an exceptional basis, for 24 months.

3. The plea for three months salary in lieu of notice.

The Tribunal concurs with the JAB's reasoning that, since the Applicant resigned in order to obtain early retirement, it would be illogical to expect the Administration to pay him any compensation in lieu of notice.

II. The Tribunal, however, holds a different view than the one adopted by the JAB regarding the Applicant's claim for compensation due to the endangerment of his life, and his and his family's physical integrity and health. The discomfort of the

JAB with its own negative position in this aspect emerges clearly from the following paragraph of its "remarks":

> "...the panel would like to express its concern regarding the way in which the appellant's case was handled during his time of employment with UNICEF. The panel disapproves of the long duration for which the staff member was obliged to perform tasks of a nature above his rank or training. The rules limiting SPA payments to a period of one year mean that staff members should not be performing functions at a higher level for a longer period than that. This is particularly so when as a result of this a staff member's life is threatened. The panel would like to also point out its dissatisfaction with the discontinuance of efforts that were made by the Organization to place the appellant at a different duty station, once it was clear that he was suffering threats to his life as a direct result of his involvement in the investigation process in the UNICEF Kenya Country Office. Although there might not have been a legal obligation to make more persistent efforts to relocate the staff member to another duty station, the panel believes that there was certainly a moral one to do so, especially in view of the fact that the staff member's participation in the audit and the police investigations seem to have been effective and also very much appreciated by the Organization."

Contrary to the JAB's belief, the Tribunal is satisfied that, the Organization does have a legal obligation to protect its staff members and not put them in dangerous situations, if these can be avoided. Staff regulation 1.2(.c) regarding the duties, obligations and privileges of staff members, establishes the following:

> "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them."

The Tribunal does not agree with the JAB's analysis, according to which damages "can only result from a wrongful act committed either negligently or with intent by the Organization". Clearly, failure to act can result in damages as well, such as in the case when there is a duty to protect but no protection is given. Furthermore, the JAB asserts that, since the damages that the Applicant suffered were the direct result of the Organization fulfilling its obligation in endeavouring to uncover criminal acts which occurred from within, "such a conduct cannot be wrongful and cannot therefore conceivably result in a claim for damages". Once again, the Tribunal must correct this notion. There is no doubt regarding the Organization's obligation to uncover and discipline those who are engaged in

criminal activity within its ranks. However, this duty does not free the Respondent from the obligation to protect staff members who carry out, or otherwise assist, in conducting such investigations.

III. The Applicant had participated in the first part of the investigation, from 31 October 1994 to 31 December 1995, assisting the audit team in their investigation. During this period it became evident that he was looked upon as an informant of the Administration. Consequently, threats against his and his family's lives were made and he had been physically attacked on more than one occasion. In April 1997, when the investigation was handed over to the local police, the Applicant was assigned to assist them and subsequently he was asked to testify in court.

In May 1995, the Applicant, seeking to protect himself and his family, requested to be assigned to another duty station. His request was fully supported by the Representative, KCO, who repeated this request in his communications with the Division of Human Resources, UNICEF. Once the Applicant requested to be relocated, it became evident that he did not volunteer to go on with his dangerous mission, but that the Administration insisted on his continuation, as he was considered to be a useful element in the police investigation and in the court proceedings that followed.

The police stage of the investigation seems to have been, for the Applicant, even worse than the administrative process, and, on 26 March 1998, he requested early retirement. The Applicant repeated this request on 25 June and 15 September 1998, and his request was granted, leading to the Applicant's separation from service on 31 October 1998.

IV. The Tribunal is satisfied with the following two points: the first one being that the Applicant's request for early retirement was clearly prompted by the dangerous and extremely unpleasant situation in which he had been placed as a consequence of the tasks imposed on him by the Organization. These tasks were carried out against his will as of May 1995, when he asked to be transferred to another duty station. The second point is that such transfer was practically the only way that the Organization had at its disposal to protect the Applicant and fulfil the Respondent's obligation in compliance with regulation 1.2 (c), in "that all necessary safety and

security arrangements" were made in order for the staff member to carry out the responsibilities with which the Organization would entrust him.

The Tribunal wishes to emphasize the importance it attaches to this duty of the Respondent. Furthermore, even were such obligation not expressly spelled out in the Regulations and Rules, general principles of law would impose such an obligation, as would normally be expected of every employer. The United Nations, as an exemplary employer, should be held to higher standards and the Respondent is therefore expected to treat staff members with the respect they deserve, including the respect for their well being. The Tribunal further wishes to point out that, particularly in cases where investigations are carried out, such as in the present case, the success of these investigations often depends on cooperation from the local staff. The Organization would find it very difficult to obtain such cooperation if it fails to accord protection to those providing it.

The request for early retirement, which frustrated the Applicant's career and had a negative impact on his pension benefits, eloquently depicts the gravity of the situation to which he was subjected due to the insensitivity of the Administration towards his highest interests. The Tribunal is satisfied that, had it not been for the attitude of the Administration, which chose to ignore both the Applicant's and the Representative's requests in what seems to be, at the least, a negligent manner, the Applicant would have continued to serve with the United Nations.

V. As for the Applicant's pleas for reversing his own decision and for his reinstatement, the Tribunal finds these to be not receivable. In the first place, there was no administrative decision to contest, as it was at the Applicant's request that he separated from service. Additionally, theses pleas were not brought before the JAB, nor has the Secretary-General agreed to direct submission of these issues to the Tribunal.

VI. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid eight percent interest on the SPA from the date on which his entitlement to SPA began (three months after starting to perform duties at the higher level) until the actual date of payment;

2. Orders that the Applicant be compensated in the sum of $50,000, to be paid in United States Dollars; and,

3. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Spyridon **Flogaitis**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

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